

◀DRAFT▶

California Urban Water Agencies/Environmental Water Caucus

URBAN WATER CONSERVATION

CERTIFICATION FRAMEWORK

Note: This document is submitted to CALFED by the California Urban Water Agencies and the Environmental Water Caucus as a joint proposal to define the structure of an Urban water conservation certification program as part of the CALFED/Bay-Delta Program. CUWA and the EWC are open to changes which improve the proposal and are consistent with its intent and balance of stakeholder interests.

November 1998

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1. INTRODUCTION

In November 1996, California Urban Water Agencies (CUWA) and the Environmental Water Caucus (EWC) established principles supporting the joint development and advancement of an urban water conservation framework as part of the CALFED Water Use Efficiency Common Program. Building from the Memorandum of Understanding Regarding Urban Water Conservation in California (MOU), the CUWA/EWC principles described a four-point framework to guide further investments in and implementation of urban water conservation programs throughout California. This document contains the CUWA/EWC joint recommendations to develop this framework as part of the Water Use Efficiency Common Program.

1.1 Background

The Water Use Efficiency Common Program proposes several strategies to promote more efficient allocation and use of water from the Bay-Delta watershed. Urban water conservation is one of these strategies. Others include agricultural water conservation, urban and agricultural water reclamation, and market-based water transfers. While CUWA and EWC consider each of these strategies to be essential to the overall success of any CALFED solution, the recommendations contained herein only address the Water Use Efficiency Common Program as it relates to urban water conservation.

Efforts to improve urban water use efficiency in California have been underway for some time. The 1991 signing of the *Memorandum of Understanding Regarding Urban Water Conservation in California* (MOU) greatly advanced urban water management by providing water agencies a consensus-based framework in which to implement water conser-

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vation Best Management Practices (BMPs). The MOU process now involves more than 150 urban water suppliers serving over two-thirds of the state's population. While substantial progress under the MOU has been made, BMP implementation has been uneven across signatories, and conservation potential remains untapped.

Through its 1996 strategic planning process, the California Urban Water Conservation Council (CUWCC) recognized the need to improve monitoring and evaluation of BMP implementation. The CUWCC developed a five-point strategy to further promote implementation of BMPs by signatories. A key element of this strategy was a review and revision of the BMP definitions, implementation schedules, and performance and evaluation criteria.

On September 30, 1997, following a yearlong process, the CUWCC adopted a comprehensive revision of BMP definitions, implementation schedules, performance standards, and implementation evaluation criteria contained in Exhibit 1 of the MOU. With these revisions in place, the CUWCC is now positioned to effectively monitor BMP implementation and exemption status of urban water suppliers.

As a result of these developments, CUWA and EWC believe that the Water Use Efficiency Common Program will best advance urban water conservation by retaining a BMP-based framework which includes the following components:

- continued use of the "cost-effective" BMP implementation standard;
- flexible and achievable BMP implementation standards and performance targets;

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- a workable process for monitoring and evaluating water agency BMP implementation progress;
- a certification and assurance process to generate high levels of water agency compliance with the MOU.

The following recommendations represent a logical and balanced extension of the original MOU framework, retaining the MOU's implementation flexibility, while providing enhanced performance assurances appropriate to broader CALFED objectives.

1.2 Conditions for Support of Proposed Framework

Support for and acceptance of this or any proposed urban water conservation framework by CUWA and EWC is conditional on the adoption of a CALFED Bay-Delta solution acceptable to both parties. In the absence of a mutually acceptable CALFED solution, neither party commits to supporting or accepting any elements of any proposed urban water conservation framework deemed to be beyond the scope of the current MOU.

1.3 Proposal Contents

In addition to this introduction, this proposal contains the following: Section 2 provides an overview of the proposed urban water conservation framework; section 3 discusses the proposed requirements and process to establish and maintain MOU certification; section 4 proposes wholesale water supplier requirements; and section 5 discusses implementation issues. In addition, the Principles of Agreement between CUWA and EWC are included as an appendix.

2. OVERVIEW OF PROPOSED FRAMEWORK

The proposed framework is based on the existing BMP process as specified by the MOU. As with the existing process, urban water suppliers would be responsible for implementing cost-effective BMPs and periodically reporting their implementation progress to the CUWCC. The CUWCC would continue providing outreach and technical assistance to agencies implementing BMPs, as well as conducting studies to advance new conservation technologies and programs. Cost-effectiveness would continue to serve as the primary benchmark for BMP implementation, and the current cost-effectiveness-burden-of-proof requirements would remain.¹

This proposal also expands the current BMP implementation process in two important ways. First, urban water suppliers with more than 3,000 connections or delivering more than 3,000 acre-feet annually within the CALFED solution area would be required to demonstrate compliance with the MOU. These water suppliers would be periodically reviewed and certified as in compliance or not in compliance with the MOU. Second, assurance mechanisms would be put in place to discourage MOU non-compliance and reward MOU compliance.

CALFED has identified the CUWCC as the preferred certification entity.² *CUWA and EWC support the CUWCC as the certification entity conditional on mutually acceptable*

¹ Under the MOU, it is the responsibility of each water agency seeking a BMP exemption to demonstrate that the BMP is not cost-effective. In other words, BMPs are assumed cost effective unless proven non-cost-effective. Under the proposed framework cost-effectiveness analyses would be required to conform to the CUWCC's Guidelines for Preparing Cost-Effectiveness Analyses of Urban Water Conservation Best Management Practices, and the CUWCC would be required to critically evaluate all BMP exemption claims

² Page 2-15, Water Use Efficiency Component Technical Appendix of the CALFED Bay-Delta Program Programmatic EIS/EIR

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modifications to the CUWCC's governance and administrative structures to assure balanced stakeholder representation and participation in certification decisions.

To summarize, the proposed framework consists of four elements, as follows:³

- Agency Reporting -- This element consists of agencies preparing BMP implementation status reports and submitting them to the CUWCC for evaluation. This element is part of the existing BMP process.
- Evaluation -- This element consists of the CUWCC evaluating agency performance based on evaluation criteria contained in Exhibit 1 of the MOU. Evaluations would be based on agency implementation reports and cost-effectiveness exemption submittals. This element is also part of the existing BMP process.
- Certification -- This element consists of adopting and implementing a process to certify water supplier compliance with the MOU. This element expands the current BMP process, and may require legislation to implement.
- Assurance Mechanisms -- This element consists of using assurance mechanisms to discourage MOU non-compliance and reward MOU compliance. As with the certification element, this expands the current BMP process and may require legislation to implement.

³ For simplicity, the CUWCC is referred to as the certification entity, though it is understood that the choice of the CUWCC has not been finalized.

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2.1 Water Supplier Participation

CUWA and EWC recommend that only water suppliers hydrologically or institutionally connected to the Bay-Delta watershed be required to demonstrate MOU compliance.

This roughly corresponds to urban water suppliers operating within the CALFED solution area.⁴

CUWA and EWC further recommend that certification be limited to urban water suppliers with more than 3,000 connections or delivering more than 3,000 acre-feet annually, which corresponds to the eligibility criteria for submitting urban water management plans to the Department of Water Resources under the Urban Water Management Planning Act.⁵ Table 1 summarizes the recommended program eligibility criteria and certification schedule.

Table 1. MOU Certification Program Participation

No. Connections	Within CALFED Solution Area	Outside CALFED Solution Area
Retail Supplier Less than 3,000 ⁶	Not Required	Not Required
Retail Supplier 3,000 to 10,000	Compliance Review Every 5 Years	Not Required
Retail Supplier More than 10,000 ⁷	Compliance Review Every 2 Years	Not Required

⁴ CALFED Bay-Delta Program, Programmatic EIS/EIR Executive Summary, March 1998. Page 8.

⁵ CALFED has proposed that DWR certify compliance with the Urban Water Management Planning Act as part of the Water Use Efficiency Program.

⁶ Or deliveries of less than 3,000 acre-feet per year.

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Wholesale Supplier Delivering more than 3,000 AF/Yr	Compliance Review Every 2 Years	Not Required
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2.2 Regional Coordination

CUWA and EWC recommend that water suppliers serving adjacent areas be able to coordinate MOU compliance for their combined service areas. Water suppliers regionally coordinating implementation of BMPs should be able to submit a single compliance report for the combined region. For example, a wholesale water supplier with the consent of its member agencies should be able to assume certification responsibility for its entire service area. In this case, the wholesale water supplier would be evaluated by the CUWCC as though it were a single, large retail water supplier. A group of adjacent retail water suppliers should be able to centrally coordinate BMP implementation in a similar fashion.

2.3 MOU Compliance Standard

CUWA and EWC recommend using the BMP implementation criteria contained in the MOU as the basis for determining certification. Under this recommendation, a water supplier demonstrating implementation of all cost-effective BMPs, or BMP-variants, per Exhibit 1 of the MOU, and documenting valid BMP implementation exemptions per sections 4.4 - 4.6, and Exhibit 3 of the MOU would receive full certification.

⁷ As discussed later in this proposal, water suppliers with more than 10,000 connections demonstrating compliance for three consecutive reviews would be moved to the 5 year review cycle.

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Because BMP requirements for wholesale water suppliers are much less extensive than for retail suppliers, CUWA and EWC recommend additional responsibilities and commitments to regional conservation for regional wholesale water suppliers receiving exported or diverted water from the Bay-Delta watershed as part of the Water Use Efficiency Common Program. These requirements would be separate and distinct from MOU certification, and are discussed in subsequent sections of this proposal. In lieu of additional responsibilities and commitments, a regional wholesale water supplier could assume certification responsibility for its entire service area if such an approach is supported by its member agencies.

2.4 BMP Implementation Variances

In accordance with the "at least as effective as" language contained in each BMP definition, CUWA and EWC recommend that water suppliers be allowed to deviate from Exhibit 1 BMP implementation requirements as long as a proposed variant is at least as effective as the implementation method contained in Exhibit 1 of the MOU.⁸ To assure consistent monitoring and evaluation of BMP implementation, CUWA and EWC recommend that water suppliers obtain prior approval to initiate BMP variants.⁹ This recommendation differs from current MOU requirements only in that it requires the certification entity to approve water supplier BMP variants prior to their implementation.

⁸ The proposed framework retains the MOU's "at least as effective as" BMP implementation standard. The preamble to Section A of Exhibit 1 of the MOU states: "It is recognized by all parties that a single implementation method for a BMP would not be appropriate for all water suppliers. In fact, it is likely that as the process moves forward, water suppliers will find new implementation methods even more effective than those described. Any implementation method used should be at least as effective as the methods described [in Exhibit 1]."

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2.5 Assurances

A primary intention of adding certification to the MOU process is to provide a structure in which appropriate assurances for urban water use efficiency may be implemented.

CUWA and EWC recommendations for an MOU certification program encompass six mechanisms to assure urban water use efficiency for purposes of the CALFED program, as follows:

1. Provide technical and financial assistance to implement BMPs;
2. Certify urban water supplier compliance with the MOU;
3. Reward MOU compliance through
 - Public recognition
 - less frequent monitoring and evaluation
 - preferential water supply/treatment loan/grant access or terms
 - preferential State Drought Bank access or terms
4. Publicly report water supplier non-compliance;
5. Apply monetary fines for persistent non-compliance; and
6. Apply CALFED water-supply sanctions for persistent non-compliance.^{10,11}

⁹ Under the MOU, signatories are required to file BMP exemptions at the start of each two-year reporting period. CUWA and EWC recommend that water suppliers also apply to implement BMP variants at the start of each reporting period.

¹⁰ Water-based sanctions have been proposed by CALFED. These potential sanctions are described on page 2-6 of the Water Use Efficiency Component Technical Appendix of the CALFED Bay-Delta Program Programmatic EIS/EIR (1998), where it is stated that

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*CUWA and EWC recommend placing primary reliance on the first four compliance strategies. That is, program emphasis should be given first to positive incentives for MOU compliance, then to moderate negative incentives, and then, only if these approaches prove ineffective, to more consequential negative incentives. Thus, monetary fines and CALFED water supply sanctions should be reserved for deterring persistent MOU non-compliance, and should be applied only after a water supplier has had reasonable opportunity and assistance to comply with the MOU following a non-compliance finding.*¹² CUWA/EWC believe the due process procedures recommended herein provide for these circumstances. The proposed assurances are summarized in Table 2 on the following page. CUWA and EWC recommendations for applying these assurances are presented in the following sections.

...CALFED and CALFED agencies will implement three general policies to provide assurances of efficient use. Demonstration that appropriate water management and planning is being carried out and that cost-effective efficiency measures are being implemented will be necessary prerequisites for an agency to be eligible to:

- receive any "new" water made available by a Bay-Delta solution*
- participate in a water transfer that requires approval by any CALFED agency or use of facilities operated by any CALFED agency, and*
- receive water through the DWR Drought Water Bank (this is already a policy of DWR)*

For urban water suppliers, this includes DWR certification of the supplier's urban water management plans and updates, and California Urban Water Conservation Council certification of the supplier's compliance with the terms of the Urban MOU.

¹¹ Water supply sanctions could be applied to any retail water agency reaching level 3 enforcement, as described later in this proposal. Practically, however, one or more wholesalers often stand between most retail agencies and water supplies to which the enforcement agency could attach conditions. Such conditions could only be enforced with the cooperation of the wholesalers. Retailers not served by wholesalers have pointed out that this results in unbalanced exposure to water supply sanctions unless wholesalers are required to comply with water supply conditions placed on a member agency. CUWA wholesale water suppliers have expressed a willingness to pass through water supply sanctions under the condition that it is a non-discretionary action required by law.

¹² Administrative fines for late or incomplete reports discussed in a subsequent section of this proposal provide an exception. These fees would not be subject to appeal.

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Table 2. MOU Compliance Assurances

Primary Reliance	Responsible Entity
• CALFED-Supported Technical/Financial Assistance	CALFED Agencies
• MOU Compliance Certification	Certification Entity/CUWCC
• Reward Compliance	
1. Public acknowledgment	Certification Entity/CUWCC
2. Reduce frequency of certification reviews	Certification Entity/CUWCC
3. Preferential state loan/grant access	CALFED Agencies
4. Preferential Drought Bank access/price	CALFED Agencies
• Report MOU Non-Compliance	Certification Entity/CUWCC
Secondary Reliance	
• Financial Sanctions	CALFED Agencies
• Water Supply Sanctions	CALFED Agencies

3. MOU CERTIFICATION AND APPEALS

This section provides more detailed recommendations for structuring MOU compliance requirements, evaluation and certification processes, and appeals processes.

3.1 Certification Entity Responsibilities

CUWA and EWC recommend the certification entity's role be limited to administering a peer review process for determining and reporting MOU compliance, particularly if the certification entity is the CUWCC. Application of monetary or water supply sanctions for MOU non-compliance should be a separate and distinct responsibility outside the certification entity's jurisdiction.

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Given that MOU compliance evaluations will require timely and complete reporting on BMPs by water suppliers, CUWA and EWC recommend that the certification entity be given authority to administer letters of notice and nominal fines for late and/or incomplete reporting. The certification entity also should have the discretion to extend due dates for water suppliers with legitimate and unavoidable causes for late or incomplete reporting. Table 3 provides a suggested schedule and administrative actions for late or incomplete reporting.

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Table 3. Proposed Administrative Actions for Late or Incomplete Reporting

Reporting Violation	CUWCC Administrative Action
Report not submitted by due date or report incomplete in some or all of its parts. ¹³	Written notice to water supplier alerting it that report has not been received or is incomplete.
Complete report not submitted within 30 days of due date.	Written notice to water supplier alerting it that report has not been received; assessment of \$500 fine.
Complete report not submitted within 60 days of due date.	Written notice to water supplier alerting it that report has not been received; assessment of administrative fine of \$1,000.
Complete report not submitted within 90 days of due date.	Written notice to water supplier alerting it that report has not been received; assessment of administrative fine of \$2,000; certification status changed to suspended.

3.2 MOU Compliance Evaluation Criteria

For the purposes of this section, the term “water supplier” refers to urban retail and wholesale water suppliers, as well as a group of urban water suppliers coordinating MOU compliance for their combined service areas. For purposes of discussion, this section also assumes the CUWCC is the certification entity.

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*CUWA and EWC recommend that a water supplier meeting the following criteria be
deemed in compliance with the MOU for purposes of the CALFED Water Use Efficiency
Program:*

- the water supplier has submitted a compliance report to the CUWCC in accordance with the reporting requirements and schedule specified in Section D of Exhibit 1 of the MOU;
- the water supplier's compliance report is complete in all its parts, and all information and claims presented therein can be substantiated;
- Using the *Criteria to Determine BMP Implementation Status* set forth in Section E of Exhibit 1 of the MOU, the CUWCC determines that the water supplier's BMP implementation meets or exceeds the minimum implementation requirements set forth in Sections A, B, and C of Exhibit 1 of the MOU.
- the water supplier has substantiated any exemptions from implementing specific BMPs in accordance with Sections 4.4 - 4.6 of the MOU, and BMP exemptions based on cost-effectiveness are in accordance with Exhibit 3 of the MOU and the CUWCC Cost-Effectiveness Guidelines.

Following evaluation, the water supplier would be placed in one of three compliance categories:

¹³ This assumes that the certification entity would mail reminder notices to all water suppliers 60 days prior to the date their report is due.

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- **Full Compliance** - the water supplier is determined to be in full compliance with the MOU. The water supplier is issued a Notice of Compliance and no further reporting or monitoring is required prior to the next review date -- two years for retail suppliers with more than 10,000 connections and wholesale suppliers with annual deliveries of more than 3,000 acre-feet, and five years for retail suppliers with between 3,000 and 10,000 connections.
- **Conditional Compliance** - the water supplier is determined to have gone out of compliance between review cycles. The water supplier is issued a Notice of Conditional Compliance and is given twelve months to return to compliance or adopt an approved compliance plan if returning to compliance is anticipated to require more than twelve months.
- **Suspension** - the water supplier is determined to have remained out of compliance for twelve months or has failed to adopt an approved compliance plan following the issuance of a Notice of Conditional Compliance. The water supplier's certification would be suspended for 6 months, and the water supplier would be referred to CALFED agencies for potential enforcement action.

3.3 MOU Compliance Paths

Figure 1 provides a flow diagram of the proposed compliance review cycle. Starting with the initial MOU compliance evaluation in the upper left-hand portion of the diagram, possible water supplier compliance paths are shown. Given an appropriate set of compliance assurances, it is anticipated that the majority of water suppliers will actively seek compliance with the MOU and hence most suppliers will receive Notices of Compliance

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following each evaluation (path 1 in the diagram). It is also anticipated that of the water suppliers out of compliance with the MOU and receiving Notices of Conditional Compliance, the majority will take action to return to full compliance within 12 months (path 2 in the diagram). Finally, it is expected that only a small minority of suppliers will be issued Notices of Suspension by failing to return to compliance following the twelve-month conditional compliance period (path 3). These suppliers would face potential CALFED enforcement actions, which are described in the following sections of this proposal.

3.4 Graduated Enforcement

In the Principles of Agreement dated December 1996, CUWA and the EWC established the principle that any proposed MOU certification framework is conditional on the development of acceptable guidelines and procedures for applying any agreed to enforcement tools. Moreover, it was agreed that these guidelines and procedures must include a graduated enforcement process that (1) provides water suppliers a reasonable opportunity to come into compliance before the application of penalties; (2) focuses enforcement on persistent non-compliance; and (3) includes provisions for due process. This section describes the implementation of this principle.

CUWA and EWC propose dividing enforcement actions into three levels, as follows:

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- **Level 1** - enforcement actions would include public disclosure of decertification and a modest financial penalty.¹⁴
- **Level 2** - enforcement actions would include public disclosure of decertification and a moderate financial penalty.
- **Level 3** - enforcement actions would include public disclosure of decertification, a substantial financial penalty, and exposure to CALFED water supply sanctions.¹⁵

Figure 1 shows the proposed sequence for triggering each enforcement level. The initial consequence of a finding of non-compliance is conditional certification. This would last for 12 months and enforcement actions would not be applicable during this period. This period would offer CALFED an opportunity to direct any necessary technical and funding assistance to the supplier, as well as afford the supplier time to come into compliance or develop a compliance plan.

If at the end of the conditional compliance period, the supplier has returned to compliance or has adopted an approved compliance plan, full compliance would be restored until the next review period. If the supplier either has not come into compliance or has not

¹⁴ CUWA and EWC have not proposed specific fine amounts, but rather are leaving such proposals to the broader CALFED forum. If monetary sanctions are established by CALFED, CUWA and EWC agree that they should be graduated, increasing with the persistence of non-compliance; and should be neither so high as to be viewed as overly punitive, nor so low as to be viewed as non-consequential.

¹⁵ At minimum, support for the use of water supply sanctions proposed by CALFED requires that exposure to them must be equal across water suppliers. Because many retail water suppliers are served by one or more wholesaler, it may not always (or in most cases) be possible to apply water supply sanctions directly to a water supplier facing a Level 3 enforcement action. Rather, the sanctions would have to be indirectly applied through intervening wholesale water suppliers. This may result in unequal exposure to water supply sanctions unless wholesalers are required to pass through the sanction in a direct manner. For example, by curtailing the water supplier's deliveries by an amount equal to the sanction. CUWA wholesale agencies have agreed in principle to a direct pass through requirement as long as it is non-discretionary.

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adopted a compliance plan, the supplier would be referred to a designated CALFED agency for Level 1 enforcement and certification would be suspended for 6 months.

If at the end of the first 6-month suspension period the supplier has returned to compliance or has adopted an approved compliance plan, the supplier would move to conditional compliance status. If the supplier either has not come into compliance or has not adopted a compliance plan, the supplier would be referred to a designated CALFED agency for Level 2 enforcement and certification would be suspended an additional 6 months.

If at the end of the second suspension period, the supplier has returned to compliance or has adopted an approved compliance plan, the supplier would move to conditional compliance. If, however, the supplier either has not come into compliance or has not adopted a compliance plan, the supplier would be referred to a designated CALFED agency for Level 3 enforcement and certification would be suspended an additional 6 months.

CUWA and EWC recommend that only when a supplier reaches Level 3 enforcement, would it be exposed to CALFED water supply sanctions.¹⁶

Table 4 and Table 5 show the minimum time that would have to elapse prior to exposure to CALFED water supply sanctions given a 2 year and 5 year review cycle, respectively. As shown in the tables approximately 5 years would elapse from the start of the BMP certification program before a supplier on a 2-year review cycle would face water supply sanctions. This increases to approximately 8 years for a supplier on a 5-year review cy-

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cle. Some may argue that these lead times would render eventual enforcement actions ineffective as deterrents to non-compliance. However, during this period, a supplier would be evaluated a minimum of 4 times by the certification entity, and if non-compliance persisted, these evaluations would become more frequent. The intent of these lead times, combined with accelerated review cycles for out-of-compliance suppliers, is to provide CALFED agencies and the certification entity sufficient time to work constructively with a water supplier having difficulty achieving compliance with the MOU. The application of water supply sanctions would be reserved for cases of persistent MOU non-compliance.

3.5 Certification Decision-Making

CUWA and EWC recommend a peer-review, stakeholder-driven certification decision-making process similar to what is outlined below. The discussion that follows assumes the CUWCC is the certification entity.¹⁷

- CUWCC staff would evaluate water supplier MOU compliance according to the Criteria to Determine BMP Implementation Status set forth in Section E of Exhibit 1 of the MOU. Data for the evaluation would largely come from water supplier BMP implementation reports. Following completion of the review, staff would prepare a summary report making recommendations for findings of compliance or non-

¹⁶ A supplier reaching Level 3 might also be reviewed by the State Water Resources Control Board for potential waste and unreasonable use.

¹⁷ As previously discussed, CUWA and EWC support the CUWCC as the certification entity conditional on mutually acceptable modifications to the CUWCC's governance and administrative structures to assure balanced stakeholder representation and participation in certification decisions.

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compliance. This report would then be forwarded to the Certification Review Committee for action.

- The Certification Review Committee would be the body within the CUWCC formally responsible for making decisions regarding MOU compliance status. The committee would be comprised of three CUWCC representatives from Group 1, three CUWCC representatives from Group 2, a representative or the head of conservation from the Department of Water Resources, a representative or the head of conservation from the United States Bureau of Reclamation Mid Pacific Region, and a “representative at large” agreed-to by Groups 1 and 2.¹⁸
- CUWCC committee members would be appointed by the Secretary of Resources from a list of nine nominees from each group. Nominees from each group would be formally elected by their respective memberships.¹⁹
- The “representative at large” would also be appointed by the Secretary of Resources from a list of three nominees. Nominees for the “representative at large” must be approved by a majority of Group 1 signatories and a majority of Group 2 signatories.
- Each committee member would be assigned an alternate. Alternates for a CUWCC representative would come from the representative’s group, and would be appointed by the Secretary of Resources from the submitted list of nine nominees. The alternate

¹⁸ CUWA/EWC are open to variations on this structure, so long as they result in balanced stakeholder representation. EWC members currently believe the DWR and BUREC representatives should be the heads of respective conservation functions. CUWA currently believes it should be up to DWR and the BUREC to specify the assignments. As written here, it is not meant to imply any favor for either view

¹⁹ Again, variations in the number of nominees are open for consideration. The important feature is that each stakeholder group may select qualified nominees from its ranks for consideration by the Secretary of Resources.

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for the "representative at large" would also be appointed by the Secretary of Resources from the submitted list of three nominees. Alternates for DWR and USBR representatives must be from the conservation departments of those agencies and approved by the director of each agency.

- Terms for Group 1 and 2 committee members and the "representative at large" would be for two years, and staggered to maintain committee continuity. Committee members could be reappointed to serve additional terms according to the process just described.
- The Certification Review Committee would have 120 days from the date of receipt of a water supplier's compliance report or its due date, whichever is later, to make a compliance status determination.
- Certification review meetings would be open to the public and staff recommendation on certification decisions would be available for review not less than ten days before the date of the meeting.
- To prevent deadlocks and to minimize decision-making delays, decisions regarding certification status would have to be made by the full committee with no abstentions. Alternates would be substituted for committee members in cases of absence or conflict of interest. If determination of a supplier's compliance status is delayed, the supplier would continue under its existing status until such time as a decision could be rendered. For example, if a supplier's existing status were full compliance and their review were delayed, they would continue to be considered in full compliance during the processing period.

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- To minimize the likelihood that review of a supplier with suspended or conditional compliance status would be delayed, decisions regarding certification status would be prioritized as follows: (1) suppliers whose certification has been suspended would have first priority for review; (2) suppliers with conditional compliance status would have second priority; and (3) suppliers with full compliance status would have last priority. Within each category, suppliers would be ranked for review according to their scheduled review dates, so that suppliers that have waited longest would have first priority for review.

3.6 Appealing Certification Decisions

Figure 1 also indicates points in the certification process where certification decisions can be appealed by the entity under review or any Group 2 CUWCC member provided the issue appealed was raised during the certification review process. Under this proposal, all decisions regarding compliance status rendered by the certification entity could be appealed under a *de novo* appeals process -- i.e., a decision by the certification entity would not be prejudicial and all facts and evidence could be reviewed. For example, prior to reaching Level 3 enforcement there would be four separate opportunities to appeal certification decisions. Appellants would have 45 days from the date of decision to file an appeal. Any appellant that does not appeal the notice within 45 days, would be deemed to have accepted the certification decision, and all rights of appeal would expire. Appeals would be referred to a designated CALFED agency, and thus resolved outside the certification entity.

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CUWA and EWC recommend the appeals process include specific provisions to discourage frivolous or strategic appeals, as follows:

- Grounds for appeal must be established by the certification entity and the agency responsible for deciding appeals. Only appeals meeting these criteria would be considered. Appeals not meeting these criteria would be dismissed.
- Certification decisions would stand until overturned by appeal. Under this approach, an appellant would have less incentive to file an unwarranted appeal, since doing so would not delay a change in certification status. However, an appellant would still have incentive to file a warranted appeal in order to reverse an unjustified change in certification status.
- The use of filing fees or outcome-dependent cost responsibility should also be explored as ways to discourage frivolous or strategic appeals.

Figure 1. Certification Process Flow Diagram Showing Alternative Compliance Paths

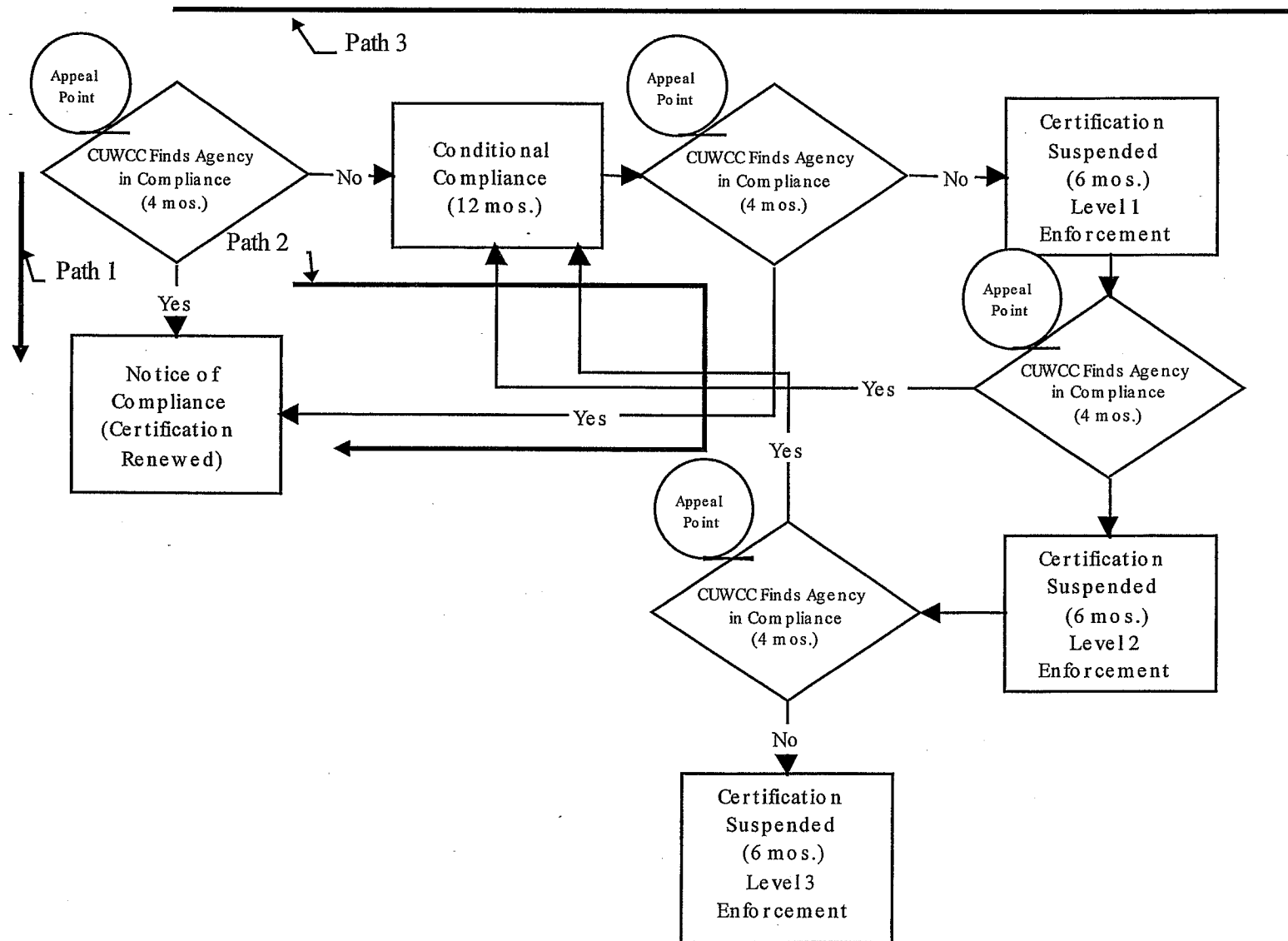


Table 4. Decision and Enforcement Timeline for Agencies with more than 10,000 Connections

Program Phase	Months	Outcome	
BMP Implementation	24	Agency out of compliance with MOU	
Agency Evaluation	4	Notice of Non-Compliance; agency moved to conditional certification	Appeal Point
Conditional Certification	12	Agency does not adopt compliance plan	
Agency Evaluation	4	Notice of Non-Compliance; certification suspended; level 1 enforcement	Appeal Point
Certification Suspension	6	Agency does not adopt compliance plan	
Agency Evaluation	4	Notice of Non-Compliance; certification suspended; level 2 enforcement	Appeal Point
Certification Suspension	6	Agency does not adopt compliance plan	
Agency Evaluation	4	Notice of Non-Compliance; certification suspended; level 3 enforcement including water supply sanctions	Appeal Point
Total Elapsed Time	5.33 years		

Table 5. Decision and Enforcement Timeline for Agencies with fewer than 10,000 Connections

Program Phase	Months	Outcome	
BMP Implementation	60	Agency out of compliance with MOU	
Agency Evaluation	4	Notice of Non-Compliance; agency moved to conditional certification	Appeal Point
Conditional Certification	12	Agency does not adopt compliance plan	
Agency Evaluation	4	Notice of Non-Compliance; certification suspended; level 1 enforcement	Appeal Point
Certification Suspension	6	Agency does not adopt compliance plan	
Agency Evaluation	4	Notice of Non-Compliance; certification suspended; level 2 enforcement	Appeal Point
Certification Suspension	6	Agency does not adopt compliance plan	
Agency Evaluation	4	Notice of Non-Compliance; certification suspended; level 3 enforcement including water supply sanctions	Appeal Point
Total Elapsed Time	8.33 years		

4. REGIONAL WHOLESALE WATER SUPPLIERS

Regional wholesalers diverting or exporting water from the Delta or its tributaries have expressed concern about exposure to water supply sanctions created by retail agencies they serve but have only indirect or no control over. *To address this problem, CUWA and EWC recommend separate and distinct wholesaler compliance requirements that if met would eliminate such wholesaler's exposure to water supply sanctions.*²⁰

CUWA and EWC suggest the following five alternative compliance requirements for regional water supply wholesalers be considered by the WUECP. CUWA and EWC recommend that a wholesale water supplier in compliance with at least one of these alternatives should not be exposed to CALFED's proposed water supply sanctions. Selection of the option below would be at the discretion of the wholesale entity.

4.1 Conservation Budget Commitment

Under this alternative, CALFED would establish a baseline conservation program-funding requirement for regional wholesale agencies diverting/exporting water from the Bay-Delta watershed. One option would be for CALFED to set a per-acre-foot-of-diverted/exported-water funding requirement. An agency's baseline funding requirement would then be its average annual diversions/exports multiplied by the per-acre-foot funding requirement.

²⁰ This would be in addition to responsibilities of the wholesaler to pass on water supply sanctions for a retail agency facing a Level 3 enforcement action. Unless the wholesale agency has elected to implement BMPs on behalf of its retail agencies, retailers and wholesalers remain independently responsible for compliance for their jurisdiction and retailers may still be subject to water based sanctions even through their wholesale agency is not exposed to these sanctions.

4.2 Cost Sharing Commitment

Under this alternative, a regional wholesale agency diverting/exporting water from the Bay-Delta watershed would fulfill its obligations under the Water Use Efficiency Common Program by being in compliance with the MOU and agreeing to cost-share with member agencies investments in conservation programs. To comply with this alternative, the wholesaler would agree to fund any cost-effective conservation program or new investment proposed by a subagency by an amount equal to the marginal cost of avoided water supply development or one-half the program cost, whichever is less. The wholesale agency would not be exposed to water-based sanctions as long as it maintained its cost-sharing commitment to regional conservation programs at or above this level.

4.3 Rate Structure Assurance

Under this approach, a regional wholesale water supplier exporting/diverting water from the Bay-Delta watershed would fulfill its obligations under the Water Use Efficiency Common Program by being in compliance with the MOU and adopting a wholesale water rate structure that included an MOU-non-compliance surcharge equal to the per acre-foot marginal cost of new water supply. All surcharge revenue would be directed to regional conservation program funding. The wholesale agency would not be exposed to water-based sanctions as long as it maintained the MOU-non-compliance surcharge. To comply with this option, the surcharge must reach the retail agency level. Thus, secondary wholesale agencies would have to pass on the surcharge for the primary wholesaler to comply with this option.

4.4 Regional Responsibility for MOU Compliance

Under this approach, a regional wholesale water supplier exporting/diverting water from the Bay-Delta watershed would fulfill its obligations under the Water Use Efficiency Common Program by assuming regional responsibility for MOU compliance. For purposes of MOU compliance, the entire region would be evaluated as though it were a single, large retail service area. Neither the wholesaler nor underlying retailing agency would ~~not~~ be exposed to water-based sanctions as long as the region as a whole was in compliance with the MOU. The wholesaler would assume responsibility for all retail service areas within its service area and be the one entity exposed to sanctions. This option would require consent by subagencies in the service area.

4.5 Regional MOU Accountability

Under this approach, a regional wholesale water supplier exporting/diverting water from the Bay-Delta watershed would not be exposed to water-based sanctions as long as some percent of its service area population (to be negotiated by CALFED and CALFED stakeholders) was receiving water from a water supplier in compliance with the MOU. The regional wholesale water supplier would not have primary responsibility for implementing BMPs, as under the previous approach, but would have a strong incentive to invest regionally to assure the compliance threshold is met. If the agreed to percentage of compliance is not met, the wholesaler is exposed to sanctions. Additionally, unlike the previous option, every retailer remains responsible for their own compliance as well.

5. IMPLEMENTATION ISSUES

5.1 Funding

Implementation of the proposed framework would require the following funding assurances:

- Funding Commitment -- Funding commitments for the CUWCC or other certification entity necessary to assure the sustainability and integrity of the evaluation and certification process would need to be secured prior to program implementation.
- CALFED Financing Package -- Funding for the urban water conservation framework should be addressed explicitly by the CALFED financing package. Funding mechanisms and sources would need to be secured prior to program implementation. CUWA/EWC recommend a 50/50 cost-sharing arrangement between CALFED and urban water suppliers.
- Committee Funding -- Most Group 2 signatories face significant budget constraints that limit their ability to participate in the CUWCC. This may also be the case for the "public" representative selected by Groups 1 and 2. CUWA/EWC therefore recommend per diem compensation for Group 2 and public representatives serving on the Compliance Review Committee. This would be consistent with compensation provided by the CUWCC to Group 2 Convenors while the Certification Committee is meeting.

5.2 Authorizations

Legislation is expected to be required for the CUWCC or any other entity to undertake the certification program outlined by this proposal. In particular, statutory authority is likely to be required to:

- Make legally binding MOU compliance determinations for individual water supply agencies;
- Levy processing fees on individual water supply agencies for MOU compliance reviews;
- Levy administrative fines on individual water supply agencies for late or incomplete MOU compliance reports.

The final CALFED solution must contain appropriate financial and legal indemnification to protect the CUWCC or similar certification entity in its proper exercise of the functions identified and described in this proposal. Any cases brought to the CALFED agency designated to hear appeals of certification decisions must be *de novo* hearings. Additional legislative authorizations may be required for CALFED agencies to implement the proposed assurance mechanisms. In particular, legislative authority to assess non-compliance fines may be required.²¹

²¹ It is CALFED's position that it currently has the necessary authority to make compliance with the MOU a precondition for (1) participating in water transfers requiring CALFED agency approval or involving transfer facilities controlled by CALFED agencies; (2) participating in the State Water Bank; and (3) obtaining new water supply from the Delta.

Appendix A

CUWA / EWC

PRINCIPLES SUPPORTING THE JOINT DEVELOPMENT AND ADVANCEMENT
OF AN URBAN WATER CONSERVATION FRAMEWORK AS PART OF THE
CALFED WATER USE EFFICIENCY COMMON PROGRAM

December 3, 1996

The CALFED Water Use Efficiency Common Program will employ a variety of strategies to promote more efficient allocation and use of water from the Bay-Delta watershed, including enhanced urban and agricultural water conservation, reclamation and recycling, and voluntary market-based water transfers. Crafting feasible and effective frameworks for each of these program elements will be an important focus during Phase II of the CALFED Bay-Delta Program.

In support of this effort, California Urban Water Agencies (CUWA) and the Environmental Water Caucus (EWC) are pursuing the joint-development of an Urban Water Conservation Framework (hereinafter referred to as "Proposed Framework") to be advanced as part of the CALFED Water Use Efficiency Common Program. This document presents mutually agreed to principles and conditions supporting the development, advancement, and acceptance of this Proposed Framework.

**REGARDING THE PROPOSED FRAMEWORK'S RELATIONSHIP TO CAL-
FED**

1. CUWA and the EWC agree that support for and acceptance of any Proposed Framework is linked to the implementation of an acceptable CALFED Bay-Delta Program "solution". In the absence of a CALFED solution, neither party is obligated to support or accept any elements of any Proposed Framework deemed to be beyond the scope of the current BMP MOU.

REGARDING THE NEED FOR URBAN WATER CONSERVATION

1. CUWA and the EWC affirm that the state's water purveyors are entrusted by the public to use scarce water resources in economically responsible and environmentally sound ways, and that the Proposed Framework must be crafted in a manner that allows agencies sufficient flexibility and discretion to fulfill this trust.
2. CUWA and the EWC affirm that water conservation provides urban water purveyors opportunities to improve customer service, reduce individual demands on state and local water supplies, and lessen environmental impacts of water diversions, and that the Proposed Framework must be crafted in a manner that encourages agencies to pursue *cost-effective* conservation to the maximum extent feasible.

REGARDING THE NEED FOR AGENCY FLEXIBILITY

1. CUWA and the EWC affirm the CALFED solution principle that water use efficiency strategies, while striving to meet broad social objectives, must also make sense within the regions they are being implemented, and that the Proposed Framework must be crafted in a way that allows local context to govern the emphasis given to a particular strategy.
2. CUWA and the EWC affirm that BMP-based urban water conservation standards that allow flexible implementation of cost-effective conservation programs remain the most appropriate way to advance urban water conservation in California, and that the Proposed Framework should represent a logical and balanced extension of the original MOU process while also providing improved performance assurances deemed necessary within the broader CALFED context in which it would be implemented.
3. CUWA and the EWC affirm that cost-effectiveness should remain the basis for BMP implementation or exemption, and that the Proposed Framework should retain the MOU's cost-effectiveness-burden-of-proof requirements and cost-effectiveness-analysis criteria.

REGARDING THE NEED FOR PERFORMANCE ASSURANCES

1. CUWA and the EWC affirm that the existing MOU process may not provide adequate urban water conservation performance assurances, and that the Proposed Framework must be crafted to include performance assur-

ances appropriate to and consistent with the broader structure and goals of CALFED's Water Use Efficiency Common Program.

2. CUWA and the EWC affirm that any provisions for performance assurances included as part of the Proposed Framework must balance the need for incentives and rewards for agencies meeting or exceeding their water conservation obligations with the need for disincentives and sanctions for agencies not meeting their obligations.

REGARDING THE IMPLEMENTATION OF PERFORMANCE ASSURANCES

1. CUWA and the EWC agree that implementation of performance assurances included as part of the Proposed Framework is conditional on the mutual acceptance of BMP performance standards, reporting requirements, and evaluation criteria developed by the California Urban Water Conservation Council (CUWCC).
2. CUWA and the EWC agree that full implementation of any Proposed Framework is conditional on the development of acceptable guidelines and procedures for applying any agreed to enforcement tools. Moreover, it is agreed that these guidelines and procedures must include a graduated enforcement process providing agencies a reasonable opportunity to come into compliance before the application of penalties; provisions to focus enforcement on gross violators; and provisions for due process that allow agencies appropriate recourse in the decision-making process.

REGARDING THE SELECTION OF ENFORCEMENT TOOLS

1. CUWA and the EWC agree that support for and acceptance of any Proposed Framework that includes performance assurances beyond those implicit in the current BMP MOU is conditional on a mutually agreed to set of enforcement tools. The parties further agree to work together in conjunction with CALFED or its successor to develop a politically feasible set of enforcement tools that provide appropriate consequences for BMP implementation performance.

REGARDING THE BMP PROCESS AND CUWCC CAPABILITIES

1. CUWA and the EWC agree that support for and acceptance of any Proposed Framework that includes performance assurances beyond those implicit in the current BMP MOU is conditional on acceptable resolution of the following issues related to the MOU and the CUWCC:

BMP Definitions and Implementation Standards -- Full acceptance of any Proposed Framework is conditional on the CUWCC successfully completing its effort to revise the list of BMPs and their definitions to make them more focused and precise, and to include reporting requirements and evaluation criteria that facilitate performance evaluation. Towards this end, CUWA and the EWC agree to support and work with the CUWCC in its effort to adopt revised BMP definitions, reporting requirements, and evaluation criteria by the end of FY 1996.

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Monitoring and Evaluation -- Full acceptance of any Proposed Framework is conditional on the CUWCC's capability to monitor, evaluate and report water agency conservation efforts in a credible manner. CUWA and the EWC, in developing the Proposed Framework, agree to support the CUWCC in its efforts to identify, develop, and implement appropriate information gathering structures and procedures for reporting and evaluating agency BMP implementation progress. It should be noted that the CUWCC has earmarked \$20,000 of FY 1996 budget and has secured a matching grant of \$30,000 from the United States Bureau of Reclamation to develop the necessary structures and procedures.

CUWCC Funding and Staffing -- Full acceptance of any Proposed Framework is conditional on an acceptable plan to fund and staff the CUWCC and/or other designated bodies to assure the sustainability and integrity of the Proposed Framework.

REGARDING THE DEVELOPMENT OF PROPOSED FRAMEWORK ELEMENTS

1. Given the above stated principles and conditions, and in accordance with the timeline set forth below, **CUWA and the EWC agree to jointly pursue with the CUWCC the development and implementation of enhanced agency reporting requirements and CUWCC evaluation capabilities.** This corresponds to developing and implementing framework

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elements (1) and (2) as described in the Draft Proposed Framework dated
October 15, 1996.

2. Given the above stated principles and conditions, and in accordance with
the timeline set forth below, **CUWA and the EWC agree to jointly pur-
sue more detailed development of the certification and enforcement
elements of the Proposed Framework.** This corresponds to developing
in detail and potentially implementing framework elements (3) and (4) as
described in the Draft Proposed Framework dated October 15, 1996.
3. Given the above stated principles and conditions, **CUWA and the EWC
agree to establish a schedule and workplan for developing the four
elements of the proposed framework. The schedule and workplan will
be established no later than December 31, 1996. The schedule and
workplan will include work tasks, resource needs, milestones, and a
completion date for the Proposed Framework, and will be based upon
the following dates for key deliverables:**

<u>Deliverable/Action</u>	<u>Completion Target Date</u>
CALFED Submittal of Workplan, Schedule, and Outline of Proposed Framework	January 31, 1997
CUWCC Ad Hoc BMP Revisions Committee Recommendations	January 31, 1997
CUWCC BMP Revisions Workshops	February, 1997

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CUWCC Plenary Vote to Adopt Revised BMPs

April, 1997

Development of CUWCC Agency Reporting/Evaluation Tools and
Database

September 1997

Development of Agency Certification Procedures and Institutional
Responsibilities

October 1997

Development of Enforcement Tools and Institutional Responsibilities

November 1997